conjunction with Section 621(a)(1), requires **us** to prevent **LFAs** from adversely affecting the deployment of broadband services through cable regulation."'

42. We do not find persuasive incumbent cable operators' claims that build-out should necessarily be required for new entrants into the video market because of certain obligations faced by cable operators in their deployment of voice services. To the extent cable operators believe they face undue regulatory obstacles to providing voice services, they should make that point in other proceedings, not here. In any event, commenters generally agree that the record indicates that the investment that a competitive cable provider must make to deploy video in a particular geographic area far outweighs the cost of the additional facilities that a cable operator must install to deploy voice service.[148]

43. ***LFA Demands Unrelated to the Provision of video Services.*** Many commenters recounted franchise negotiation experiences in which **LFAs** made unreasonable demands unrelated to the provision of video services. Verizon, for example, described several communities that made unreasonable requests, such as the purchase of street lights, wiring for all houses of worship, the installation of cell phone towers, cell phone subsidies for town employees, library parking at Verizon's facilities, connection of **220** traffic signals with fiber optics, and provision of free wireless broadband service in an area in which Verizon's subsidiary does not offer such service.[149] In Maryland, some localities conditioned a franchise upon Verizon's agreement to make its data services subject to local customer service regulation.'" AT&T provided examples **of** impediments that Ameritech New Media faced when it entered the market, including a request for a new recreation center and pool.'" **FTTH**

[147] AT&T Comments at **45.** *See also infra* para. **63.**

[148] *See* NTCA Comments at **7;** Verizon Reply at **54-55;** American Consumer Institute Comments **at 7;** *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* **18** FCC Rcd **16978, 17142-17143** (2003) ("*Triennial Review Order");See also* High Tech Broadband Coalition Comments at **4-5** (fiber-to-the-home deployment increased 5300 percent since the *Triennial Review Order,* due in large part to the elimination of barriers to entry in that Order).

[149] Verizon Comments at **57 &** Attachment A at **16-17.** The *Wall Street Journal* reported "[Tampa, Florida] City officials presented [Verizon] with a **$13** million wish list, including money for an emergency communications network, digital editing equipment and video cameras to film a math-tutoring program for kids." Another community presented Veriwn with "requests for seed money for wildflowers and a video hookup for Christmas celebrations." Dionne Searcey, *As Verizon Enters Cable Business, if Faces Local Static*, WALL ST. *J.,* Oct. **28,2005,** at **A1.** *But see* Verizon Comments at **65,** filed February 13, **2006** (stating that "one franchising authority in Florida demanded that Verizon meet the incumbent cable operator's cumulative payments for PEG, which would exceed **$6** million over **15** years of Verizon's proposed franchise term. When Verizon rejected this demand, the LFA doubled its request, asking for a fee in excess of $13 million that it said would be used for both PEG support and the construction of a redundant institutional network."); Verizon Revised Comments, filed March **6, 2006** at 65 (amending the second sentence of their comments above, in response to a request from the City of Tampa, to state that "[w]hen Verizon rejected this demand and asked for an explanation, the LFA provided a *summary* 'needs assessment' in excess of $13 million for both PEG support."); Tampa Reply at **3-4** (noting that Verizon's errata "clarified that the City of Tampa has not demanded Verizon provide **$13.5** million dollars as a condition of granting a cable television franchise," and calling the *Wall Street Journal* article assertions an "urban legend"); John Dunbar, *FCC's Cable TV Ruling Criticized,* ASSOCIATED PRESS, Jan. **29,2007** (stating that "[The Tampa City Attorney] said Tampa gave Verizon a **$13** million 'needs assessment' that was required by law in order to obtain contributions for equipment for public access and government channels" and also quoting the City Attorney saying that "it is possible the 'needs assessment' included video cameras to film shows such as the math class, but that there was never 'a specific quid pro quo.' Nor was anything like that mentioned in the franchise agreement.").

[150] Verizon Comments at **75.**

[151] AT&T Comments at **24.**

Council highlighted Grande Communications' experience in San Antonio, which required that Grande Communications make an up-front, $1 million franchise fee payment and fund a $50,000 scholarship with additional annual contributions of $7,200.[152] The record demonstrates that LFA demands unrelated to cable service typically are not counted toward the statutory 5 ercent cap on franchise fees, but rather imposed on franchisees in addition to assessed franchise fees.'" Based on this record evidence, we are convinced that LFA requests for unreasonable concessions are not isolated, and that these requests impose undue burdens upon potential cable providers.

44. ***Assessment of Franchise Fees.*** The record establishes that unreasonable demands over franchise fee issues also contribute to delay in franchise negotiations at the local level and hinder competitive entry.[154] Fee issues include not only which franchise-related costs imposed on providers should be included within the 5 percent statutory franchise fee cap established in Section 622(b),[155] but also the proper calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). In Virginia, municipalities have requested large "acceptance fees" upon grant of a franchise, in addition to franchise fees.[156] Other LFAs have requested consultant and attorneys' fees."' Several Pennsylvania localities have requested franchise fees based on cable and non-cable revenues.[158] Some commenters assert that an obligation to provide anything of value, including PEG costs, should apply toward the franchise fee obligation.[159]

45. **The** parties indicate that the lack of clarity with respect to assessment of franchise fees impedes deployment of new video programming facilities and services for three reasons. First, some LFAs make unreasonable demands regarding franchise fees as a condition of awarding a competitive franchise. Second, new entrants cannot reasonably determine the costs of entry in any particular community. Accordingly, they may delay or refrain from entering a market because the cost of entry is unclear and market viability cannot be projected.[160] Thud, a new entrant must negotiate. these terms prior to obtaining a franchise, which can take a considerable amount of time. Thus, unreasonable demands by some LFAs effectively creates an unreasonable barrier to entry.

46. ***PEG and I-Net Requirements.*** Negotiations over PEG and I-Nets also contribute to delays in the franchising process. In response to the *Local **Franchising** NPRM*, we received numerous comments asking for clarification of what requirements LFAs reasonably may impose on franchisees to

[152] FTTH Council Comments at 38,

[153] BSPA Comments at 8. BSPA argues that under the current franchising process, LFAs are able to bargain for capital payments to use on infrastructure needs when LFAs should use the capital to benefit consumers. BSPA claims that LFAs use the capital to build and maintain I-Nets, city broadcasting facilities, and traffic light control systems. *Id*.

[154] *See, e.g.*, AT&T Comments at 64-67; BellSouth Comments at **38-40;** Cavalier Telephone Comments at **7;** FTTH Council Comments at 38-40. *But **see*** NATOA Reply at 27-35.

[155] 47 U.S.C. § 542(b)

[156] Verizon Comments at 59.

[157] *Id.* at 59-60,

[158] ***Id.*** at 63.

[159] AT&T Comments at 65-67; BellSouth Comments at 39.

[160] AT&T Reply at 31-32.

support PEG and I-Nets."' We also received comments suggesting that some LFAs are making unreasonable demands regarding PEG and I-Net support as a condition of awarding competitive franchises.[162] LFAs have demanded funding for PEG programming and facilities that exceeds their needs, and will not provide an accounting of where the money goes.[163] For example, one municipality in Florida requested $6 million for PEG facilities, and a Massachusetts community requested 10 PEG channels, when the incumbent cable operator only provides two.[164] Several commenters argued that it is unreasonable for an LFA to request a number of PEG channels from a new entrant that is greater than the number of channels that the community is using at the time the new entrant submits its franchise application.[165] The record indicates that LFAs also have made what commenters view as unreasonable institutional network requests, such as free cell phones for employees, fiber optic service for traffic signals, and redundant fiber networks for public buildings.[166]

47. ***Level-Playing-Field Provisions.*** The record demonstrates that, in considering franchise applications, some LFAs are constrained by so-called "level-playing-field" provisions in local laws or incumbent cable operator franchise agreements.[167] Such provisions typically impose upon new entrants terms and conditions that are neither "more favorable" nor "less burdensome" than those to which existing franchisees are subject.[168] Some LFAs impose level-playing-field requirements on new entrants even without a statutory, regulatory, or contractual obligation to do so.[169] Minnesota's process allows incumbent cable operators to be active in a competitor's negotiation, and incumbent cable operators have challenged franchise grants when those incumbent cable operators believed that the LFA did not follow correct procedure.[170] According to BellSouth, the length of time for approval of its franchises was tied directly to level-playing-field constraints; absent such demands (in Georgia, for example), the company's applications were granted quickly.[171] NATOA contends, however, that although level-playing-field

[161] ***See, e.g.***, AT&T Comments at 67-70; BellSouth Comments at 39; Consumers for Cable Choice Comments at 8; FTTH Council Comments at 36-37, 66-67; Verizon Comments at 65-75. ***Bur* see** NATOA Reply at 30-42.

[162] FTTH Council Comments at 36; Verizon Comments at 65-66

[163] Verizon Comments at 65

[164] ***Id.*** at 65-66.

[165] Consumers for Cable Choice Comments at 8; Verizon Comments at 71

[166] Verizon Comments at 73.

[167] ***See, e.g.***, Orange County, Fla. Comments at 3; Northwest Suburbs Cable Communications Commission Comments at 3; Winston-Salem, N.C. Comments at 5; Albuquerque, N.M. Comments at 3; **Tulsa,** Okla. Comments at 2-4; Enumclaw, Wash. Comments at 2; Madison, Wis. Comments at 5-6.

[168] ***See** Local **Franchising** NPRM*, 20 FCC Rcd at 18588. At least 10 states impose level-playing-field requirements upon LFAs, and those laws vary significantly in the subject matters they encompass. For example, compare Minnesota's requirement that a competitive entrant face similar build-out, franchise fee, and PEG requirements to Illinois's requirement that the competitive franchise be no more favorable with respect to the territorial extent of the franchise, system design, technical performance standards, construction schedules, bonds, standards for construction and installation of facilities, service to subscribers, PEG channels and programming, production assistance, liability and indemnification and franchise fees. MINN. STAT. ANN. § 238.08 (West 2006), 55 ILL. COMP. STAT. ANN. 5/5-1095(e)(4) (West 2006), ***see** also* ALA. CODE § 11-27-2 (ZOOS), CONN. GEN. STAT. § 16-331(g) (2006), FLA. STAT. § 166.046(3) (2006), N.H. REV. STAT. ANN. § 53-C:3-b (2005), OKLA. STAT. ANN. tit. 11, § 22-107.1(B) (West 2006). S.D. CODIFIED LAWS § 9-35-27 (2005), TENN. CODE. ANN. § 7-59-203 (2005).

[169] ***See*** GMTC ***et** al.* Comments at 15; Pasadena, Ca. Comments at 10-11; Philadelphia, Pa. Comments at 7. **See** *also* AT&T Reply at 14.

[170] LMC Comments at 12-15.

provisions sometimes can complicate the franchising process, they do not present unreasonable barriers to entry."' NATOA and LFAs argue that level-playing-field provisions serve important policy goals, such as ensuring a competitive environment and providing for an equitable distribution of services and obligations among all operators."'

48. The record demonstrates that local level-playing-field mandates can impose unreasonable and unnecessary requirements on competitive applicants.[174] As noted above, level-playing-field provisions enable incumbent cable operators to delay or prevent new entry by threatening to challenge any franchise that an LFA grants.[175] Comcast asserts that MSOs are well within their rights to insist that their legal and contractual rights are honored in the grant of a subsequent franchise.[176] The record demonstrates, however, that local level-playing-field requirements may require LFAs to impose obligations on new entrants that directly contravene Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.[177] In most cases, incumbent cable operators entered into their franchise agreements in exchange for a monopoly over the provision of cable service.[178] Build-out requirements and other terms and conditions that may have been sensible under those circumstances can be unreasonable when applied to competitive entrants. NATOA's argument that level-playing-field requirements always serve to ensure a competitive environment and provide for an equitable distribution of services and obligations ignores that incumbent and competitive operators are not on the same footing. LFAs do not afford competitive providers the monopoly power and privileges that incumbents received when they agreed to their franchises, something that investors recognize.[179]

49. Moreover, competitive operators should not bear the consequences of an incumbent cable operator's choice to agree to any unreasonable franchise terms that an LFA may demand. And while the record is mixed as to whether level-playing-field mandates "assure that cable systems are responsive to the needs and interests of the local community,"'" the more compelling evidence indicates that they do not because they prevent competition. Local level-playing-field provisions impose costs and risks

(Continued from previous page)
[171] BellSouth Reply at 7.

[172] NATOA Reply at 43.

[173] ***See, e.g.***, NATOA Reply at **44**; Burnsville/Eagan Comments at 44; City of Philadelphia Reply at **2.**

[174] ***See, e.g.***, South Slope Comments at 7-8 (build-out); Verizon Comments at 60-61, 71 (PEG requirements); AT&T Comments at 67 (redundant facilities). ***See also*** FTTH Council Comments at 29-30 (quoting Hazlett & Ford study concluding that the result of level-playing-field laws "is that incumbents and [LFAs] can force entrants to incur sunk costs considerably in excess of what free market conditions would imply"). We note that, as described below, we do not address – and therefore do not preempt – state laws governing the franchising process including state level-playing-field mandates.

[175] ***See supra*** para. 34; ***see also*** DOJ ***Ex Parte*** at 15-16.

[176] Comcast Reply at 17-18 (citing Comcast's involvement in Verizon's Howard County, Maryland, franchise approval process).'

[177] Mercatus Center at 39-40; ***Phoenix Center Competition Paper*** at 7.

[178] *Id*

[179] ***See*** BSPA Comments 4; USTelecom Comments at 51-53; Mercatus Comments at 39-40.

[180] 47 U.S.C. § 521(2); *Id.*

sufficient to undermine the business plan for profitable entry in a given community, thereby undercutting the possibility of competition.'"

50. ***Benefits of Cable Competition.*** We further agree with new entrants that reform of the operation of the franchise process is necessary and appropriate to achieve increased video competition and broadband deployment.[182] The record demonstrates that new cable competition reduces rates far more than competition from DBS. Specifically, the presence of a second cable operator in a market results in rates approximately I5 percent lower than in areas without competition – about $5 per month.'" The magnitude of the rate decreases caused by wireline cable competition is corroborated by the rates charged in Keller, Texas, where the price for Verizon's "Everything" package is 13 percent below that of the incumbent cable operator, and in Pinellas County, Florida, where Knology is the overbuilder and the incumbent cable operator's rates are $10-15 lower than in neighboring areas where it faces no competition.[184]

51. We also conclude that broadband deployment and video entry are "inextricably linked"[185] and that, because the current operation of the franchising process often presents an unreasonable barrier to entry for the provision of video services, it necessarily hampers deployment of broadband services.[186] The record demonstrates that broadband deployment is not profitable without the ability to compete with the bundled services that cable companies provide.[187] As the Phoenix Center explains, "the more potential revenues that the network can generate in a household, the more likely it is the network will be

[181] Mercatus Comments at 46

[182] Veriwn Reply at *5-8*. ***See*** *also* DOJ ***Ex Parte*** at 1, 3

[183] FTTH Council Comments at 13. ***See also*** US. General Accountability Office, ***Subscriber Rates and Competition in the Cable Television Industry,*** GAO-04-262T (Mar. 2004) ("[S]ubscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in similar areas without a wire-based competitor. Our interviews with cable operators also revealed that these companies generally lower rates and/or improve customer service where a wire-based competitor is present."); U.S. General Accounting Office, GAO-04-8, ***Issues Related to Competition and Subscriber Rates in the Cable Television Industry***, Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate (2003) ("2003 ***GAO Report***") at 3 (noting that cable rates are about 15 percent lower in markets where wireline competition is present), and at 10 (estimating that with an average monthly cable rate of approximately $34 that year, subscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in areas without such a competitor); U.S. General Accounting Office, GAO-03-130, ***Issues in Providing Cable and Satellite Teievision Services,*** Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, US. Senate (2002) ("2002 ***GAO Report***") at 9 (noting that in franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider). ***See also Annual Assessment ofthe Status of Competition in the Marketfor the Delivery of Video Programming,*** MB Docket No. 05-255, Twelfth Annual Report, FCC 06-11, at para. 41 (rel. Mar. 3, 2006) and 2005 Cable Price Survey at paras. 2, 14 (noting that cable prices are 17 percent lower and decrease substantially when wireline cable competition is present).

[184] FTTH Council Comments at 15-16, including chart and declaration

[185] AT&T Comments at 12. ***See also*** BSPA Comments at 7; Freedomworks Comments at 15; Mercatus Center Comments at 34-35.

[186] Technology and Democracy Project Comments at 4.

[187] AT&T Comments at 12. The Government Accountability Office reached this same conclusion in its review ofthe video service market. ***See Issues in Providing Cable and Satellite Television Services,*** GAO 03-130 at 2 (2002).

built to that household."[188] DOJ's comments underscore that additional video competition will likely speed deployment **of** advanced broadband services to consumers.[189] Thus, although LFAs only oversee the provision of wireline-based video services, their regulatory actions can directly affect the provision of voice and data services, not just cable.[190] We find reasonable AT&T's assertion that carriers will not invest billions **of** dollars in network upgrades unless they are confident that LFAs will grant permission to offer video services quickly and without unreasonable difficulty.[191]

52. In sum, the current operation of the franchising process deters entry and thereby denies consumers choices.[192] Delays in the franchising process also hamper accelerated broadband deployment and investment in broadband facilities in direct contravention of the goals of Section 706,[193] the President's competitive broadband objectives,"' and our established broadband goals.[195] In addition, the economic effects **of** franchising delays can trickle down to manufacturing companies, which in some cases have lost business because potential new entrants would not purchase equipment without certainties that they could deploy their services.[196] We discuss below our authority to address these problems.

B. The Commission Has Authority to Adopt Rules to Implement Section 621(a)(1)

53. In the ***Local Franchising*** *NPRM,* the Commission tentatively concluded that it has the authority to adopt rules implementing Title VI of the Act,[197] including Section 621(a)(1).[198] The Commission sought comment on whether it has the authority to adopt rules or whether it is limited to providing guidance.[199] Based on the record and governing legal principles, we affirm this tentative conclusion and find that the Commission has the authority to adopt rules to implement Title VI and, more specifically, Section 621(a)(1).

54. Congress delegated to the Commission the **task** of administering the Communications Act. As the Supreme Court has explained, the Commission serves "as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by

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188 Letter from Lawrence Spiwak, President, Phoenix Ctr. for Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission, at Att., ***Phoenix Center Policy Paper Number 23. The Impact of Video Service Regulation on the Construction of Broadband Networks to Law-Income Household,*** pg 23 (March 13,2006) ***("Phoenix Center Redlining Paper").***

189 DOJ ***Ex Parte*** at 3-4.

190 FTTH Council Comments at **4.**

191 AT&T Comments at 15.

192 DOJ ***Ex Parte*** at 7-8.

193 Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

194 ***See*** The White House, ***A New Generation of American Innovation,*** 11-12 (April 2004), ***available at*** http:llwww.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf.

195 ***See*** Federal Communications Commission, ***Strategic Plan 2006-2011*** at 3 (2005).

1% AT&T Reply at 9; Alcatel Comments at 1; Letter from Danielle Jafari, Director and Legal Counsel of Government Affairs, Telecommunications Industry Association, to Marlene Dortch, Secretary, Federal Communications Commission (March 9,2006).

197 ***Local Franchising NPRM,*** 20 FCC Rcd at 18589.

198 47 U.S.C. § 541(a)(1).

199 ***Local Franchising NPRM,*** 20 FCC Rcd at 18589.

telephone, telegraph, cable, or radio."[200] To that end, "[t]he Act grants the Commission broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility."[201] Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[202] "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to cany out the 'provisions of this Act.'"[203] This grant of authority therefore necessarily includes Title VI of the Communications Act in general, and Section 621(a)(1) in particular. Other provisions in the Act reinforce the Commission's general rulemaking authority. Section 303(r), for example, states that "the Commission from time to time, as public convenience, interest, or necessity requires shall ... make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.. .."[204] Section 4(i) states that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[205]

55. Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services."[206] Moreover, as we explained in the *Local Franchising NPRM,* Congress specifically charged the Commission with the administration of the Cable Act, including Section 621.[207] In addition, federal courts have consistently upheld the Commission's authority in this area.[208]

56. Although several commenters disagreed with our tentative conclusion, none has persuaded us that the Commission lacks the authority to adopt rules to implement Section 621(a)(1). Incumbent cable operators and franchise authorities argue that the judicial review provisions in Sections 621(a)(1) and 635[209] indicate that Congress gave the courts exclusive jurisdiction to interpret and enforce

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200 *United States v. Southwestern Cable* Co., 392 U.S. 157, 167-68 (1968) (quotation omitted).

201 *United Telegraph Workers, AFL-CIO v. FCC,* 436 F.2d 920, 923 (D.C. Cir. 1970) (citations and quotations omitted).

202 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.").

203 *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 378 (1999).

204 *See also* 47 U.S.C. § 151 (the Commission "shall execute and enforce the provisions of this Act").

205 47 U.S.C. § 154(i).

206 47 U.S.C. § 152 ("The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI.").

207 *Local Franchising NPRM,* 20 FCC Rcd at 18589.

208 *See City of Chicago v. FCC,* 199 F.3d 424 (7th Cir. 1999) (finding that the FCC is charged by Congress with the administration of the Cable Act, including Section 621). *See also City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988) (explaining that Section 303 gives the FCC rulemaking power with respect to the Cable Act); *Nat'l Cable Television Ass'n v. FCC*, 33 F.3d 66, 70 (D.C. Cir. 1994) (upholding Commission finding that certain services are not subject to the franchise requirement in Section 621(b)(1)); *United Video v. FCC,* 890 F.2d 1173, 1183 (D.C. Cir. 1989) (denying petitions to review the Commission's syndicated exclusivity rules); *ACLU v. FCC,* 823 F.2d 1554 (D.C. Cir. 1987) (upholding the Commission's interpretive rules regarding Section 621(a)(3)).

209 47 U.S.C. § 541(a)(1) ("[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection"). Section 635 sets forth the specific procedures for such judicial proceedings. 47 U.S.C. § 555.

Section 621(a)(1), including authority to decide what constitutes an unreasonable refusal to award a competitive cable franchise.[210] We find, however, that this argument reads far too much into the judicial review provisions. The mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority?'' As a general matter, the fact that Congress provides a mechanism for judicial review to remedy a violation of a statutory provision does not deprive an agency of the authority to issue rules interpreting that statutory provision. Here, nothing in the statutory language or the legislative history suggests that by providing a judicial remedy, Congress intended to divest the Commission of the authority to adopt and enforce rules implementing Section 621.[212] In light of the Commission's broad rulemaking authority under Section 201 and other provisions in the Act, the absence of a specific grant of rulemaking authority in Section 621 is "not peculiar."[213] Other provisions in the Act demonstrate that when Congress intended to grant exclusive jurisdiction, it said so in the legislation.[214] Here, however, neither Section 621(a)(1) nor Section **635** includes an exclusivity provision, and we decline to read one into either provision.

57. In addition, we note that the judicial review provisions at issue here on their face apply only to a final decision by the franchising authority.[215] They do not provide for review of unreasonable refusals to award an additional franchise by withholding a final decision or insisting on unreasonable terms that an applicant properly refuses to accept. Nor do the judicial review provisions **say** anything about the broader range of practices governed by Section 621.[216]

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[210] ***See*** NCTA Reply, at 11-13 (given the courts have concurrent jurisdiction to review many provisions of Title VI, Section 635(a) only has meaning if it is read to grant exclusive jurisdiction to the courts); Comcast Comments at 27-28 (Congress provided no role for the Commission in the franchising process); Comcast Reply at 27-28 (621(a)(1)'s "unreasonably refuse" language and court review are inextricably linked and thus enforcement authority over the franchising approval process lies with the courts); NATOA Comments at 7-8 (same).

[211] ***See ACLU v. Texas,*** 823 F.2d 1554, 1574 (D.C. Cir 1987)(recognizing that despite a reference to "court action" in Section 622(d), in the absence of more explicit guidance from Congress, the Commission has concurrent jurisdiction to take enforcement action with respect to franchise fee disputes).

[212] ***See*** BellSouth Reply at 35; USTelecom Reply at 14-16.

[213] ***AT&T v. Iowa Utilities Board,*** 525 U.S. 366, 385 (1999). In ***Iowa Utilities Board,*** the Supreme Court reviewed Commission rules implementing provisions of the Telecommunications Act of 1996. In particular, states challenged Commission rules implementing Section 252(c)(2), which provides, "a State commission shall . . . establish any rates for interconnection, services, **or** network elements." 47 U.S.C. § 252(c)(2). Although this and other provisions in the 1996 Act entrusted the states with certain tasks, the Supreme Court held that "these assignments . . . do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." ***Iowa Utilities Board,*** 525 U.S. at 385. The same reasoning applies to the judicial review provisions in Sections 621(a)(1) and 635.

[214] ***See, e.g.***, 47 U.S.C. § 255(f) ("The Commission shall have exclusive jurisdiction with respect to any complaint under this section."). We do not fmd persuasive commenters' argument that the only way to give Section 635(a) any meaning is to construe it **as** giving courts exclusive jurisdiction with regard to the three Title VI provisions enumerated in Section 635(a), *i.e.,* Sections 621(a)(1), 625, and 626. ***See*** NATOA Comments at 9. None of the cases cited by commenters support this proposition. Rather, they suggest that in the absence of an exclusivity provision in the statute, the Commission and courts share jurisdiction. ***See, e.g.,*** NATOA Comments at 9 (citing *ACLU v. FCC,* 823 F.2d 1554, 1573-75 (D.C. Cir. 1987)).

[215] 47 U.S.C. § 541(a)(1) ("Any applicant whose application for a second franchise has been ***denied by a final decision*** of the franchising authority may appeal such ***final decision*** pursuant to the provisions of section 635 for failure to comply with this subsection") (emphasis added); 47 U.S.C. §555(a) ("Any cable operator adversely affected by any ***final determination*** made by a franchising authority under section 621(a)(1)" may commence an action in federal district court **or** State court) (emphasis added).

[216] ***See*** USTelecom Reply at 14.

58. We also reject the argument by some incumbent cable operators and franchise authorities that Section 621(a)(1) is unambiguous and contains no gaps in the statutory language that would give the Commission authority to regulate the franchising process?" We strongly disagree. Congress did not define the term "unreasonably refuse,'' and it is far from self-explanatory. The United States Court of Appeals for the District of Columbia Circuit has held that the term "unreasonable" **is** among the "ambiguous statutory terms" in the Communications Act, and that the "court owes substantial deference to the interpretation the Commission accords them."[218] We therefore find that Section 621(a)(1)'s requirement that an LFA "may not unreasonably refuse to award an additional competitive franchise" creates ambiguity that the Commission has the authority to resolve.[219] The possibility that a court, in reviewing a particular matter, may determine whether an LFA "unreasonably" denied a second franchise does not displace the Commission's authority to adopt rules generally interpreting what constitutes an "unreasonable refusal" under Section 621(a)(1).[220]

59. Some incumbent cable operators and franchise authorities argue that Section 621(a)(1) imposes no general duty of reasonableness on the LFA in connection with procedures **for** *awarding* a competitive franchise.[221] According to these commenters, the "unreasonably refuse to award" language in the first sentence in Section 621(a)(1) must be read in conjunction with the second sentence, which relates to the ***denial*** of a competitive franchise application.[222] Based on this, commenters claim that "unreasonably refuse to award" means "unreasonably ***deny***" and, thus, Section 621(a)(1) is not applicable before a final decision is rendered.[223] We disagree. By concluding that the language "unreasonably refuse to award" means the same thing as "unreasonably deny," commentem violate the long-settled principle of statutory construction that each word in a statutory scheme must be given meaning.[224] We find that the better reading of the phrase "unreasonably refuse to award" is that Congress intended to cover LFA conduct beyond ultimate denials by final decision, such as situations where an LFA has unreasonably refused to award an additional franchise by withholding a final decision or by insisting on unreasonable terms that an applicant refuses to accept.[225] While the judicial review provisions in Sections

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[217] ***See*** Comcast Reply at 27.

[218] ***Capital Network System, Inc. v. FCC,*** 28 F.3d 201,204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.").

[219] 47 U.S.C. § 541(a)(1) (emphasis added).

[220] ***See NCTA v. Brand X Internet Services,*** 545 U.S. 967, --, 125 S. Ct. 2688, 2700-02 (2005) (where statute is ambiguous, and implementing agency's construction is reasonable, ***Chevron*** requires federal court to accept agency's constsuction of statute, even if agency's reading differs from prior judicial construction).

[221] ***See*** NCTA Comments at 28-29; Comcast Reply at 31.

[222] ***See*** NCTA Comments at 29; Comcast Reply at 32

[223] ***See*** NATOA Comments at 30-31; NCTA Comments at 28-29; Burnsville/Eagan Comments at 31-32; Comcast Reply at 32-33.

[224] ***See Bailey v. United States,*** 516 U.S. 137, 143-45 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

[225] ***See, e.g., Tribune*** Co. ***v. FCC,*** 133 F.3d 61, 66 (D.C. Cir. 1998) (imposing an "intolerable" condition on the grant of a license application may be deemed a ***de facto*** denial of that license for purposes of the appeal provisions under § 402(b) of the Acf citing ***Mobile Communications Corp. of America v. FCC,*** 77 F.3d 1399 (D.C. Cir. 1996)). ***See also*** DOJ ***Ex Parte*** at 7 (stating that unnecessary delays, demands for goods and services unrelated to the provision of cable services, and imposition of build-out requirements are tantamount to a "refusal" to award an additional competitive franchise).

621(a)(1) and 635 refer to a "final decision" or "final determination,"[226] the Commission's rulemaking authority under Section 621 is not constrained in the same manner. Instead, the Commission has the authority to address what constitutes an unreasonable refusal to award a franchise, and as stated above, a local franchising authority may unreasonably refuse to award a franchise through other routes than issuing a final decision or determination denying a franchise application. For all of these reasons, we conclude that the Commission may exercise its statutory authority to establish federal standards identifying those LFA-imposed terms and conditions that would violate Section 621(a)(1) of the Communications Act.[227]

60. Incumbent cable operators and local franchise authorities also maintain that the legislative history of Section 621(a)(1) demonstrates that Congress reserved to LFAs the authority to determine what constitutes "reasonable" grounds for franchise denials, with oversight by the courts, and left no authority under Section 621(a)(1) for the Commission to issue rules or guidelines governing the franchise approval process.[228] Commenters point to the Conference Committee Report on the 1992 Amendments,[229] which adopted the Senate version of Section 621,[230] rather than the House version, which "contained five examples of circumstances under which it is reasonable for a franchising authority to deny a franchise."[231] We find commenters' reliance on the legislative history to be misplaced. While the House may have initially considered adopting a categorical approach for determining what would constitute a "reasonable *denial*," Congress ultimately decided to forgo that approach and prohibit franchising authorities from unreasonably refusing to *award* an additional competitive franchise.[232] To be sure, commenters are correct to point out that Congress chose not to define in the Act the meaning of the phrase "unreasonably refuse to award." However, commenters' assertion that Congress therefore intended for this gap in the statute to be filled in by only LFAs and courts lacks any basis in law or logic. Rather, we believe that it is far more reasonable to assume, consistent with settled principles of administrative law, that Congress intended that the Commission, which is charged by Congress with the administration of Title VI,[233] to have the authority to do so. There is nothing in the statute or the

[226] 47 U.S.C. §§ 541(a), 555. *See also Puget Sound Energy, Inc. v. U.S.*, 310 F.3d 613,624-25 (9th Cir. 2002) (for purposes of determining when power administration's rate determination becomes a "final action" under statutory judicial review provision, court will turn for guidance to general doctrine of finality in administrative law, which "is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury").

[227] *See* Qwest Reply at 10-11

[228] *See* NCTA Comments at 22-23; Florida Municipalities Comments at 9-10

[229] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

[230] S. REP. NO. 102-92, at 185 (1991) (explaining that "[i]t shall not be considered unreasonable for purposes of this provision for local franchising authorities to deny the application of a potential competitor if it is technically infeasible. However, the Committee does not intend technical infeasibility to be the only justification for denying an additional franchise").

[231] H.R REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260 (listing five examples ofreasonable denials identified in the House amendment to include: (1) technical infeasibility; (2) failure of the applicant to assure that it will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; (3) failure of the applicant to assure that it will provide service throughout the entire franchise area within a reasonable period of time; (4) the award would interfere with the ability of the franchising authority to deny renewal of a franchise; and (5) failure to demonstrate financial, technical, or legal qualifications to provide cable service."); H.R. REP. NO. 102-628, at 90 (1992). *See* NCTA Comments at 22; Florida Municipalities Comments at 9-10.

[232] H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-1260.

[233] *See City of Chicago v. FCC*, 199 F.3d at 428. *See also AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 377-380.

legislative history to suggest that Congress intended to displace the Commission's explicit authority to interpret and enforce provisions in Title VI, including Section 621(a)(1).

61. The pro-competitive rules and guidance we adopt in this ***Order*** are consistent with Congressional intent. Section 601 states that Title VI is designed to "promote competition in cable communications."[234] In a report to Congress prepared pursuant to the 1984 Cable Act, the Commission concluded that in order "[t]o encourage more robust competition in the local video marketplace, the Congress should ... forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service."[235] In response, Congress revised Section 621(a)(1) to prohibit a franchising authority from unreasonably refusing to award an additional competitive franchise.[236] The regulations set forth herein give force to that restriction and vindicate the national policy goal of promoting competition in the video marketplace.

62. Our authority to adopt rules implementing Section 621(a)(1) is further supported by Section 706 of the Telecommunications Act of 1996, which directs the Commission to encourage broadband deployment by utilizing "measures that promote competition ... or other regulating methods that remove barriers to infrastructure investment."[237] The D.C. Circuit has found that the Commission has the authority to consider the goals of Section 706 when formulating regulations under the Act.[238] The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsicall , and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated?" Thus, if the franchising process were allowed to slow competition in the video service market, that would decrease broadband infrastructure investment, which would not only affect video but other broadband services as well.[240] As the DOJ points out, potential gains from competition, such as

[234] 47 U.S.C. § 521(6).

[235] ***See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,*** 5 FCC Rcd 4962,4974 (1990).

[236] 47 U.S.C. § 541(a)(1). ***See also*** H.R. REP. NO. 102-628, at 47 (1992) (noting the Commission's recommendation that, in order to encourage competition, Congress should prevent LFAs from unreasonably denying a franchise to potential competitors); ***Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,*** 9 FCC Rcd 7442, 7469 (1994) (recognizing that "Congress incorporated the Commission's recommendation in the 1992 Cable Act by amending § 621(a)(1) of the Communications Act..."). The legislative history explained that the purpose of this abridgement of local government authority was to promote greater cable competition. S. REP. No. 102-92, at 47 (1991) (the prohibition on local franchising authorities from unreasonably refusing to grant second franchises is based on evidence in the record that there are benefits from competition between two cable systems and the Committee's belief that LFAs should be encouraged to award second franchises).

[237] Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[238] ***See USTA v. FCC***, 359 F.3d 554, 580, 583 (D.C. Cir. 2004); ***see also*** USTelecom Comments at 15; TIA Comments at 16.

[239] ***See*** Alcatel Comments at 5-6; USTelecom Comments at ***6*** (broadband growth is tied ***to*** bundled services; firm's perceived need to compete for "triple play" customers is the driving force for broadband investment); AT&T Comments at 39-40 (the local franchising process discourages broadband infrastructure investment that supports video along with other broadband services).

[240] ***See*** Ad Hoc Telcom Manufacturer Coalition Comments at 1-3 (the franchising process threatens to slow down incumbent LECs' capital expenditures, thereby slowing competition in the video service market and reducing output throughout the high-tech manufacturing industry); AT&T Reply at 31-32 (the lack of clear regulatory guidance is chilling investment because new entrants cannot gauge the cost of entry); BellSouth Comments at 20-22 (the current franchising process impedes the deployment of BellSouth's broadband network).

expedited broadband deployment, are more likely to be realized without imposed restrictions or conditions on entry in the franchising process.[241]

63. We reject the argument by incumbent cable operators and LFAs that any rules adopted under Section 621(a)(1) could adversely affect the franchising process.[242] In particular, LFAs contend that cable service requirements must vary from jurisdiction to jurisdiction because cable franchises need to be "tailored to the needs and interests of the local community."[243] The Communications Act preserves a role for local jurisdictions in the franchise process. We do not believe that the rules we adopt today will hamper the franchising process. While local franchising authorities and potential new entrants have opposing viewpoints about the reasonableness of certain terms,[244] we received comments from both groups that agree that Commission guidance concerning factors that are "reasonable" will help to expedite tbe franchising process.[245] Therefore, we anticipate that our implementation of Section 621(a)(1) will aid new entrants, incumbent cable operators, and LFAs in understanding the bounds of local authority in considering competitive franchise applications.

64. In sum, we conclude that we have clear authority to interpret and implement the Cable Act, including the ambiguous phrase "unreasonably refuse to award" in Section 621(a)(1), to further the congressional imperatives to promote competition and broadband deployment. As discussed above, this authority is reinforced by Section 4(i) of the Communications Act, which gives us broad power to perform acts necessary to execute our functions, and the mandate in Section 706 of the Telecommunications Act of 1996 that we encourage broadband deployment through measures that promote competition.[246] We adopt the rules and regulations in this *Order* pursuant to that authority. We find that Section 621(a)(1) prohibits not only an LFA's ultimate unreasonable denial of a competitive franchise application, but also LFA procedures and conduct that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, whether by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks, such that they effectively constitute an "unreasonable refusal to award an additional competitive franchise" within the meaning of Section 621(a)(1).[247]

C. Steps to Ensure that the Local Franchising Process Does Not Unreasonably Interfere with Competitive Cable Entry and Rapid Broadband Deployment

65. Commenters in this proceeding identified several specific issues regarding problems with the current operation of the franchising process. These include: (1) failure by LFAs to grant or deny franchises within reasonable time frames; (2) LFA requirements that a facilities-based new entrant build out its cable facilities beyond a reasonable service area; (3) certain LFA-mandated costs, fees, and other compensation and whether they must be counted toward the statutory 5 percent cap on franchise fees; (4)

[241] DOJ *Ex Parte* at 4.

[242] *See, e.g.*, Anne Arundel County *et al.* Comments at 15 (federal regulation would not allow each locality to tailor franchise terms to its specific needs); NCTA Comments at 23 (universal rules and standards cannot be tailored well enough to define what is reasonable; reasonableness must be reviewed on a case-by-case basis).

[243] NATOA Comments at 27 (quoting Section 601(2) ofthe Communications Act, 47 U.S.C. § 521(2)).

[244] *See, e.g.*, NATOA Reply at 43; Verizon Comments at 76-77 (disagreeing about the reasonableness of level playing fields).

[245] *See* Manatee County Comments at 15; Verizon Reply at 35.

[246] 47 U.S.C. § 154(i), Section 706 ofthe Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

[247] *Id.*

new entrants' obligations to provide support mandated by LFAs for PEG and I-Nets; and (5) facilities-based new entrants' obligations to comply with local consumer protection and customer service standards when the same facilities are used to provide other regulated services, such as telephony. We discuss each measure below.

1. Maximum Time Frame for Franchise Negotiations

66. As explained above,[248] the record demonstrates that, although the average time that elapses between application and grant of a franchise varies from locality to locality, unreasonable delays in the franchising process are commonplace and have hindered, and in some cases thwarted entirely, attempts to deploy competitive video services. The record is replete with examples of unreasonable delays in the franchising process,[249] which can indefinitely delay competitive entry and leave an applicant without recourse in violation of Section 621(a)(1)'s prohibition on unreasonable refusals to award a competitive franchise.'"

67. We find that unreasonable delays in the franchising process deprive consumers of competitive video services, hamper accelerated broadband deployment, and can result in unreasonable refusals to award competitive franchises. Thus, it is necessary to establish reasonable time limits for LFAs to render a decision on a competitive applicant's franchise application.[251] We define below the boundaries of a reasonable time period in which an LFA must render a decision, and we establish a remedy for applicants that do not receive a decision within the applicable time frame. We establish a maximum time frame of 90 days for entities with existing authority to access public rights-of-way, and six months for entities that do not have authority to access public rights-of-way. The deadline will be calculated from the date that the applicant files an application or other writing that includes the information described below. Failure of an LFA to act within the allotted time constitutes an unreasonable refusal to award the franchise under Section 621(a)(1), and the LFA at that time is deemed to have granted the entity's application on an interim basis, pursuant to which the applicant may begin providing service. Thereafter, the LFA and applicant may continue to negotiate the terms of the franchise, consistent with the guidance and rulings in this ***Order.***

a. Time Limit

68. The record shows that the franchising process in some localities can drag on for years. We are concerned that without a defined time limit, the extended delays will continue, depriving consumers of cable competition and applicants of franchises. We thus consider the appropriate length of time that should be afforded LFAs in reaching a final decision on a competitive franchise application. Commenters suggest a wide range of time frames that may be reasonable for an LFA's consideration of a competitive franchise application. TIA proposes that we adopt the time limit used in the Texas franchising legislation, which would allow a new entrant to obtain a franchise within 17 days of submitting an application.[252] Other commenters propose time limits ranging from 30 days to six

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[248] ***See supra*** paras. 14-17, 22

[249] ***See Local Franchising NPRM,*** 20 FCC Rcd at 18590 (quoting 47 U.S.C. § 541(a)(1)), FTTH Council Comments at 27, South Slope Comments at 13, Verizon Reply at 34-35.

[250] ***See supra*** paras. 22-30.

[251] 47 U.S.C. §§ 541(a)(1), 555.

[252] *See* TIA Comments at 8, 18.

months.[253] While NATOA in its comments opposes any time limit,[254] in February 2006 a NATOA representative told the Commission that the six-month time limit that California law imposes is reasonable.[255] Some commenters have suggested that a franchise applicant that holds an existing authorization to access rights-of-way (*e.g.*, a LEC) should be subject to a shorter time frame than other applicants. These commenters reason that deployment of video services requires an upgrade to existing facilities in the rights-of-way rather than construction of new facilities, and such applicants generally have demonstrated their fitness as a provider of communications services.[256]

69. In certain states, an SFA is responsible for all franchising decisions (*e.g.*, Hawaii, Connecticut, Vermont, Texas, Indiana, Kansas, South Carolina, and beginning January 1, 2007, California and North Carolina), and the majority of these states have established time frames within which those SFAs must make franchising decisions?” We are mindful, however, that states in which an LFA is the franchising authority, the LFA may be a small municipal entity with extremely limited resources.[258] Thus, it may not always be feasible for an LFA to carry out legitimate local policy objectives permitted by the Act and appropriate state or local law within an extremely short time frame. We therefore seek to establish a time limit that balances the reasonable needs of the LFA with the needs of the public for greater video service competition and broadband deployment. As set out in detail below, we believe that it is appropriate to provide rules to guide LFAs that retain ultimate decision-making power over franchise decisions.

70. As a preliminary matter, we find that a franchise applicant that holds an existing authorization to access rights-of-way should be subject to a shorter time frame for review than other applicants. First, one of the primary justifications for cable franchising is the locality's need to regulate and receive compensation for the use of public rights-of-way.[259] In considering an application for a cable franchise by an entity that already has rights-of-way access, however, an LFA need not devote substantial attention to issues of rights-of-way management.’” Second, in obtaining a certificate for public

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[253] ***See*** AT&T Comments at 77, Cavalier Telephone Comments at 4 (suggesting a 30-day time limit); BellSouth Comments at 36, NTCA Comments at 9, OPASTCO Reply at 4 (suggesting a 90-day time limit); Consumers **for** Cable Choice Comments at 9, Verizon Comments at 38, FTTH Council Comments at 60, State of Hawaii Reply at 3 (suggesting a 120-day time limit); Alliance for Public Technology Comments at 3 (suggesting a 180-day time limit); Qwest Comments at 26-27.

[254] NATOA Comments at 36-37, NATOA Reply at 21-23

[255] Transcript of FCC Agenda Meeting and Panel Discussion at 38 (Feb. 10, 2006)

[256] ***See Local Franchising*** *NPRM*, 20 FCC Rcd at 18591

[257] ***See*** HAW. REV. STAT. § 440G-4 (2006); CONN. GEN. STAT. *ANN.* § 16-331 (West 2006); VT. STAT. *ANN.* tit. 30, § 502 (2006); TEX. UTIL. CODE ANN. § 66.003 (West 2006); IND. CODE § 8-1-34-16 (2006); 2006 KAN. SESS. LAWS Ch. 93 (West 2006); S.C. CODE *ANN.* § 58-12-05 (2006); N.C. GEN STAT. *A".* § 66-351; CAL. PUB. UTIL. CODE § 401, et seq. We note that our ***Order*** does not affect these franchising decisions.

[258] We note that a number of other states in addition to Texas have adopted **or** are considering statewide franchising in order to speed competitive entry. ***See, e.g.***, IND. CODE § 8-1-34-16 (2006); VA. CODE ANN. § 15.2-2108.1:1 et seq. (2006); SB-816, 2006 Sess. (Mo. 2006). Nothing in our discussion here is intended to preempt the actions of any states. The time limit we adopt herein is a ceiling beyond which LFA delay in processing a franchise application becomes unreasonable. To the extent that states and/or municipalities wish to adopt shorter time limits, they remain free to do so.

[259] NATOA Comments at 38-39; Ada Township Comments at 11-14; TCCFUI Reply Comments at 18.

[260] Recognizing this distinction, some states have created streamlined franchising procedures specifically tailored to entities with existing access to public rights-of-way. ***See, e.g.***, VIRGINIA CODE *ANN.* § **15.2-2108.1:1** et seq.); HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized (continued...)

convenience and necessity from a state, a facilities-based provider generally has demonstrated its legal, technical, and financial fitness to be a provider of telecommunications services. Thus, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way. NATOA and its members concede that the authority to occupy the right-of-way has an effect on the review of the financial, technical, and legal merits of the application, and eases right-of-way management burdens.[261] We thus find that a time limit is particularly appropriate for an applicant that already possesses authority to deploy telecommunications infrastructure in the public rights-of-way.[262] We further agree with AT&T that entities with existing authority to access rights-of-way should be entitled to an expedited process, and that lengthy consideration of franchise applications made by such entities would be unreasonable.[263] Specifically, we find that 90 days provides LFAs ample time to review and negotiate a franchise agreement with applicants that have access to rights-of-way.[264]

71. Based on our examination of the record, we believe that a time limit of 90 days for those applicants that have access to rights-of-way strikes the appropriate balance between the goals of facilitating competitive entry into the video marketplace and ensuring that franchising authorities have sufficient time to fulfill their responsibilities. In this vein, we note that 90 days is a considerably longer time frame than that suggested by some commenters, such as TIA.[265] Additionally, we recognize that the Communications Act gives an LFA 120 days to make a final decision on a cable operator's request to modify a franchise.[266] We believe that the record supports an even shorter time here because the costs associated with delay are much greater with respect to entry. When an incumbent cable franchisee requests a modification, consumers are not deprived of service while an LFA deliberates. Here, delay by an individual LFA deprives consumers of the benefits of cable competition.[267] An LFA should be able to

(Continued from previous page)
to use the right-of-way without any application or negotiation requirement). ***See also*** South Slope Comments at 11 (duplicative local franchising requirements imposed on a competitor with existing authority to occupy the rights-of-way are unjustified and constitute an unreasonable barrier to competitive video entry).

261 ***See*** NATOA Comments at 38-39. Although NATOA contends that an applicant's authority to occupy the rights-of-way would not affect the length of the negotiations regarding PEG requirements, franchise fees, or build-out, we clarify the law concerning those issues below to minimize further disputes and delays.

262 Ad Hoc Telecom Manufacturers Comments at 6.

263 AT&T argues that an entity authorized to occupy a right-of-way should simply complete a short-fonn application and agree to general cable franchise requirements such as franchise fees and PEG capacity, and that the right-of-way holder should receive a franchise within one month of filing the short-form application. ***See*** AT&T Comments at 74.

264 ***See*** BellSouth Comments at 36; Ada Township, *et al.* Comments at 23; LMC Comments at 18; Hawaiian Telecom Comments at 7-8 (recommending a time frame of 90 days from the filing of the application). Several state legislators agree that an applicant's existing authority to occupy the right-of-way lightens the administrative load, and enacted or proposed similar measures to streamline the franchising process for entities that hold the authority. ***See*** VIRGINIA CODE *ANN.* § 15.2-2108.21; HF-2647, 2006 Sess. (Iowa 2006) (this proposed legislation would grant franchises to all telephone providers authorized to use the right-of-way without any application or negotiation requirement). We assume generally that state and local regulators are sufficiently empowered to deal with any public safety or aesthetic issues that may arise by virtue of deployment of new video-related equipment by applicants already authorized to use the rights-of way.

265 ***See*** TIA Comments at 8-9 (a time frame of 17 business days, as set forth in the Texas statute, "provides ample time to negotiate an agreement reflecting the requirements of Section 621"); AT&T Comments at 75, 78-79. See also supra paras. 17, 27.

266 See 47 U.S.C. § 545.

267 Veriwn Comments at 36-37.

negotiate a franchise with a familiar applicant that is already authorized to occupy the right-of-way in less than 120 days. The list of legitimate issues to be negotiated is short,[268] and we narrow those issues considerably in this ***Order.*** We therefore impose a deadline of 90 days for an LFA to reach a final decision on a competitive franchise application submitted by those applicants authorized to occupy rights-of-way within the franchise area.

72. For other applicants, we believe that six months affords a reasonable amount of time to negotiate with an entity that is not already authorized to occupy the right-of-way, as an LFA will need to evaluate the entity's legal, financial, and technical capabilities in addition to generally considering the applicant's fitness to be a communications provider over the rights-of-way. Commenters have presented substantial evidence that six months provides LFAs sufficient time to review an applicant's proposal, negotiate acceptable terms, and award or deny a competitive franchise.[269] We are persuaded by the record that a six-month period will allow sufficient time for review. Given that LFAs must act on modification applications within the 120-day limit set by the Communications Act, we believe affording an additional two months – *i.e.,* a six-month review period – will provide LFAs ample time to conduct negotiations with an entity new to the franchise area.

73. Failure of an LFA to act within these time frames is unreasonable and constitutes a refusal to award a com etitive franchise. Consistent with other time limits that the Communications Act and our rules impose' a franchising authority and a competitive applicant may extend these limits if both parties agree to an extension of time. We further note that an LFA may engage in franchise review activities that are not prohibited by the Communications Act or our rules, such as multiple levels of review or holding a public hearing?' provided that a final decision is made within the time period established under this ***Order.***

b. Commencement of the Time Period for Negotiations

74. The record demonstrates that there is no universally accepted event that "starts the clock" for purposes of calculating the length of franchise negotiations between LFAs and new entrants.[272] Accordingly, we find it necessary to delineate the point at which such calculation should begin. Few commenters offer specific suggestions on what event should open the time period for franchise negotiations. Qwest contends that the period for negotiations should commence once an applicant files an application.[273] On the other hand, Verizon argues that the clock must start before an applicant files a formal application because significant negotiations often take place before a formal filing.[274] Specifically,

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[268] Verizon Reply Comments at 43 n.69.

[269] ***See*** Cablevision Comments at 10-12; GMTC Comments at 3, ***6-8;*** State of Hawaii Reply at 3; Mt. Hood Cable Regulatory Commission Comments at 20; NJBPU Comments at ***5;*** Southwest Suburban Cable Commission Comments at 7. ***See*** *also* Fairfax County, Va. Comments at 4-7 (formal negotiations began April 1, 2005, franchise granted Oct. 1, 2005).

[270] ***See,*** *e.g.*, 47 U.S.C. § 537, 47 C.F.R. § 76.502(c).

[271] ***See*** Southwest Suburban Cable Commission Comments at 7.

[272] ***See*** *supra* paras. 14-17

[273] ***See*** Qwest Reply at 2 (establish a requirement that an LFA "must act on a franchise application within six months of filing").

[274] ***See*** Verizon Reply at 37; Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (April 21, 2006).

the company advocates starting the clock when the applicant initiates negotiations with the LFA,[275] which could be documented informally between the applicant and the LFA or with a formal Commission filing for evidentiary purposes.

75. We will calculate the deadline from the date that the applicant first files certain requisite information in writing with the LFA. This filing must meet any applicable state or local requirements, including any state or local laws that specify the contents of a franchise application and payment of a reasonable application fee in jurisdictions where such fee is required.[276] This application, whether formal or informal, must at a minimum contain: (1) the applicant's name; **(2)** the names of the applicant's officers and directors; **(3)** the applicant's business address; **(4)** the name and contact information of the applicant's contact; *(5)* a description of the geographic area that the applicant proposes to serve; *(6)* the applicant's proposed PEG channel capacity and capital support; **(7)** the requested term of the agreement; **(8)** whether the applicant holds an existing authorization to access the community's public rights-of-way; and (9) the amount of the franchise fee the applicant agrees to pay (consistent with the Communications Act and the standards set forth herein). Any requirement the LFA imposes on the applicant to negotiate or engage in any regulatory or administrative processes before the applicant files the requisite information is ***per se*** unreasonable and preempted by this ***Order.*** Such a requirement would delay competitive entry by undermining the efficacy of the time limits adopted in this ***Order*** and would not serve any legitimate purpose. At their discretion, applicants may choose to engage in informal negotiations before filing an application. These informal negotiations do not apply to the deadline, however; we will calculate the deadline from the date that the applicant first files its application with an LFA. For purposes of any disputes that may arise, the applicant will have the burden of proving that it filed the requisite information or, where required, the application with the LFA, by producing either a receipt-stamped copy **of** the filing or a certified mail return receipt indicating receipt **of** the required documentation. We believe that adoption of a time limit with a specific starting point will ensure that the franchising process will not be unduly delayed by pre-filing requirements, will increase applicants' incentive to begin negotiating in earnest at an earlier stage **of** the process, and will encourage both LFAs and applicants to reach agreement within the specified time frame. We note that an LFA may toll the running of the 90-day or six-month time period if it has requested information from the franchise applicant and is waiting for such information, Once the information is received by the LFA, the time period would automatically begin to **run** again.

c. Remedy for Failure to Negotiate a Franchise Within the Time Limit

76. Finally, we consider what remedy or remedies may be appropriate in the event that an LFA and franchise applicant are unable to reach agreement within the 90-day or six-month time frame. Section 635 of the Communications Act provides a specific remedy for an applicant who believes that an LFA unreasonably denied its application containing the requisite information within the applicable time frame. Here, we establish a remedy in the event an LFA does not grant or deny a franchise application by the deadline. In selecting this remedy, we seek to provide a meaningful incentive for local franchising authorities to abide by the deadlines contained in this ***Order*** while at the same time maintaining LFAs' authority to manage rights-of-way, collect franchise fees, and address other legitimate franchise concerns.

77. In the event that an LFA fails to grant **or** deny an application by the deadline set by the Commission, Verizon urges the Commission to temporarily authorize the applicant to provide video

[275] Id.

[276] ***See*** *infra* paras. 99-104.

service.[277] In general, we agree with this proposed remedy. In order to encourage franchising authorities to reach a final decision on a competitive application within the applicable time frame set forth in this ***Order,*** a failure to abide by the Commission's deadline must bring with it meaningful consequences. Additionally, we do not believe that a sufficient remedy for an LFA's inaction on an application is the creation of a remedial process, such as arbitration, that will result in even further delay. We also decline to agree to NATOA's suggestion that an applicant should be awarded a franchise identical to that held by the incumbent cable operator. This suggestion is impractical for the same reasons that we find local level-playing-field requirements are preempted?" Therefore, if an **LFA** has not made a final decision within the time limits we adopt in this ***Order,*** the LFA will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application. This interim franchise will remain in effect only until the LFA takes final action on the application. We believe this approach is preferable to having the Commission itself provide interim franchises to applicants because a "deemed grant" will begin the process of developing a working relationship between the competitive applicant and the franchising authority, which will be helpful in the event that a negotiated franchise is ultimately approved.

78. The Commission has authority to deem a franchise application "granted'' on an interim basis. As noted above, the Commission has broad authority to adopt rules to implement Title VI and, specifically, Section 621(a)(1) of the Communications Act.[279] As the Supreme Court has explained, the Commission serves "as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'"[280] Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[281] "[T]he grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'"[282] Section 2 *of* the Communications Act grants the Commission explicit jurisdiction over "cable services."[283] Moreover, Congress specifically charged the Commission with the administration of the Cable Act, including Section **621,** and federal courts have consistently upheld the Commission's authority in this area.[284]

79. The Commission has previously granted franchise applicants temporary authority to operate in local areas. In the early 1970s, the Commission required every cable operator to obtain a federal certificate of compliance from the Commission before it could "commence operations."[285] In effect, the Commission acted as a co-franchising authority – requiring both an FCC certificate and a local franchise (granted pursuant to detailed Commission guidance and oversight) prior to the provision of

[277] ***See*** Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission at 1 (May 3,2006).

[278] ***See infra*** para. 138. If new entrants were required to adopt the same franchises as incumbents, the new entrants would be forced to accept terms that violate Section 621(a)(1)'s prohibition on unreasonable refusals to grant franchises. ***See*** Mercatus Center at 39-40; Phoenix Center Competition Paper at 7.

[279] ***See supra*** Section III.B.

[280] *United States v. Southwestern* ***Cable*** Co., 392 U.S. 157, 167-68 (1968) (citations omitted).

[281] 47 U.S.C. § 201(b). ***See*** also 47 U.S.C. §§ **151**, 154(i), 303(r).

[282] *AT&T Corp. v.* ***Iowa*** *Utilites* ***Board,*** *525* U.S. 366,378 (1999).

[283] 47 U.S.C. § 152.

[284] ***See supra*** note 208.

[285] ***Amendment*** *of Part 74,* ***Subpart*** *K,* ***of the Commission's*** *Rules and Regulations* ***Relative*** *to Community* ***Antenna Television Systems,*** 36 F.C.C.2d 143, ¶ 178 (1972).

services.[286] As the Commission noted, "[a]lthough we have determined that local authorities ought to have the widest scope in franchising cable operators, ***the final responsibility is ours***."[287] And the Commission granted interim franchises for cable services in areas where there was no other franchising authority.[288]

80. We note that the deemed grant approach is consistent with other federal regulations designed to address inaction on the part of a State decision maker.[289] In addition, this approach does not raise any special legal concerns about impinging on state or local authority. The Act plainly gives federal courts authority to review decisions made pursuant to Section 621(a)(1).[290] As the Supreme Court observed in *Iowa Utilities Board*, "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts – but it is hard to spark a passionate 'States' rights' debate over that detail."[291]

81. We anticipate that a deemed grant will be the exception rather than the rule because LFAs will generally comply with the Commission's rules and either accept or reject applications within the applicable time frame. However, in the rare instance that a local franchising authority unreasonably delays acting on an application and a deemed grant therefore occurs, we encourage the parties to continue to negotiate and attempt to reach a franchise agreement following expiration of the formal time limit. Each party will have a strong incentive to negotiate sincerely: LFAs will want to ensure that their constituents continue to receive the benefits of competition and cable providers will want to protect the investments they have made in deploying their systems. If the LFA ultimately acts to deny the franchise after the deadline, the applicant may appeal such denial pursuant to Section 635(a) of the Communications Act. If, on the other hand, the LFA ultimately grants the franchise, the applicant's operations will continue pursuant to the negotiated franchise, rather than the interim franchise.

2. Build-Out

82. As discussed above, build-out requirements in many cases may constitute unreasonable barriers to entry into the MVPD market for facilities-based competitors?" Accordingly, we limit LFAs' ability to impose certain build-out requirements pursuant to Section 621(a)(1).

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[286] The Commission ended the certificate requirement and ceded additional authority to state and local governments in the late 1970s, but only for pragmatic reasons. ***See, e.g.***, Report and Order, 66 F.C.C.2d 380, ¶¶ 33, 37 (1977); Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 71 F.C.C.2d 569, ¶ 7 (1979) (withdrawing aspects of Commission franchising participation, but only "as long as the actions taken at the local level will not undermine important and overriding federal interests").

[287] *Teleprompter Cable Sys.*, 52 F.C.C.2d 1263, ¶ 9 (1975) (emphasis added)

[288] ***See, e.g.***, ***Cable Television Reconsideration Order,*** 36 F.C.C.2d 326, ¶ 116 (1972); ***Sun Valley Cable Communications (Sun City, Arizona),*** 39 F.C.C.2d 105 (1973); ***Mahoning Valley Cablevision, Inc. (Liberty Township, Ohio),*** 39 F.C.C.2d 939 (1973).

[289] ***See, e.g.***, 40 C.F.R. 141.716(a) (watershed control plans that are submitted to a state and not acted upon by the regulatory deadline are "considered approved" until the state subsequently withdraws such approval.); 42 C.F.R. 438.56(e)(2) (an application to disenroll from a Medicaid managed care plan shall be "considered approved" if not acted on by a state agency within the regulatory deadline). ***See also*** 47 **U.S.C.** § 160(c) (petition for forbearance "deemed granted" **if** Commission fails to deny within the regulatory deadline).

[290] *See* 47 U.S.C. § 555.

[291] ***AT&T Corp. v. Iowa Utils. Bd.,*** 525 U.S. 366, 378 n.6 (1999).

[292] ***See*** Section III.A., ***supra,*** at paras. 31-42.

a. Authority

83. Proponents of build-out requirements do not offer any persuasive legal argument that the Commission lacks authority to address this significant problem and conclude that certain build-out requirements for competitive entrants are unreasonable. Nothing in the Communications Act requires competitive franchise applicants to agree to build-out their networks in any particular fashion. Nevertheless, incumbent cable operators and LFAs contend that it is both lawful and appropriate, in all circumstances, to impose the same build-out requirements on competitive applicants that apply to incumbents.[293] We reject these arguments and find that Section 621(a)(1) prohibits LFAs from refusing to award a new franchise on the ground that the applicant will not agree to unreasonable build-out requirements.

84. The only provision in the Communications Act that even alludes to build-out is Section 621(a)(4)(A), which provides that "a franchising authority . . . shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area."[294] Far from a grant of authority, however, Section 621(a)(4)(A) is actually a limitation on LFAs' authority. In circumstances when it is reasonable for LFAs to require cable operators to build out their networks in accordance with a specific plan, LFAs must give franchisees a reasonable period of time to comply with those requirements. However, Section 621(a)(4)(A) does not address the central question here: whether it may be unreasonable for LFAs to impose certain build-out requirements on competitive cable applicants. To answer that question, Section 621(a)(4)(A) must be read in conjunction with Section 621(a)(1)'s prohibition on unreasonable refusals to award competitive franchises, and in light of the Act's twin goals of promoting competition and broadband deployment.[295]

85. Our interpretation of Section 621(a)(4)(A) is consistent with relevant jurisprudence and the legislative history. The D.C. Circuit has squarely rejected the notion that Section 621(a)(4)(A) authorizes LFAs to impose universal build-out requirements on all cable providers. The court has held that Section 621(a)(4)(A) does not require that cable operators extend service "throughout the franchise area," but instead is a limit on franchising authorities that seek to impose such obligations.[296] That decision comports with the legislative history, which indicates that Congress explicitly rejected an approach that would have imposed affirmative build-out obligations on all cable providers. The House version of the bill provided that an LFA's "refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground . . . of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area under the

[293] ***See, e.g.***, Comcast Reply Comments at 34; NCTA Reply Comments at 25-26; NATOA Reply Comments at 24; Southeast Michigan Municipalities Reply Comments at 44-45.

[294] 47 U.S.C. § 541(a)(4)(A).

[295] ***Americable Intern., Inc. v. Dep't of Navy***, 129 F.3d 1271, 1274-75 (D.C. Cir. 1997).

[296] ***Id. See also Arnericable Intern., Inc. v. U.S. Dept. of Navy***, 931 F. Supp. 1, 2-3 (D.D.C. 1996) ("Americable argues first that the Cable Act establishes a 'requirement' that a franchise 'provide universal service throughout the franchise area.' Its authority for that position is 47 U.S.C. § 541(a)(4)(A), which requires that a franchising authority (here the Navy) allow an applicant's system 'a reasonable period of time to become capable of providing cable service to all households in the franchise area. . . .' That language contains no requirement of universal service, of course. Americable's strained argument is at odds with the purpose of the Cable Act, which is to promote competition, and of the amendment in question, which protects the interests of new franchise applicants and not incumbents like Americable").

jurisdiction of the franchising authority."[297] By declining to adopt this language, Congress made clear that it did not intend to impose uniform build-out requirements on all franchise applicants.[298]

86. LFAs and incumbent cable operators also rely on Section 621(a)(3) to support compulsory build-out. That Section provides: "In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[299] We therefore address below some commenters' concerns that limitations on build-out requirements will contravene or render ineffective the statutory prohibition against discrimination on the basis of income ("redlining.")[300] But for present purposes, it has already been established that Section 621(a)(3) does not mandate universal build-out. **As** the Commission previously has stated, "the intent of [Section **621(a)(3)**] was to prevent the exclusion of cable service based on income" and "this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area."""' The U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") has upheld this interpretation in the face of an argument that universal build-out was required by Section 621(a)(3):

> The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal [build-out]. **. . .** [The provision requires] "wiring **of** all areas of the franchise" *to prevent redlining*. However, if no redlinin is in evidence, it is likewise clear that wiring within the franchise area can be limited.[3 d]

b. Discussion

87. Given the current state of the MVPD marketplace, we find that an LFA's refusal to award a competitive franchise because the applicant will not agree to specified build-out requirements can be unreasonable. Market conditions today are far different from when incumbent cable operators obtained their franchises. Incumbent cable providers were frequently awarded community-wide monopolies.[303] In that context, a requirement that the provider build out facilities to the entire community was eminently sensible. The essential bargain was that the cable operator would provide service to an entire. community in exchange for its status as the only franchisee from whom customers in the community could purchase

[297] H.R. REP. NO. 102-628, at 9 (1992)

[298] ***See Doe v. Chao,*** 540 **U.S.** 614,622-23 (2004) (finding relevance in the fact that Congress had cut out the very language in the bill that would have achieved the result claimant urged).

[299] 47 U.S.C. § 541(a)(3)

[3W] ***See, e.g.,*** Comcast Reply at 2 (arguing that incumbent LECs are seeking Commission action on build-out requirements in order to pursue their "high-value" customers while bypassing "low-value" ones).

[301] ***Implementing the Provisions of the Cable Communications Policy Act of 1984,*** Report and Order, MM Docket No. 84-1296, **58** Rad. Reg. 2d (P & F) 1, 62-63 (1985). **BSPA** Comments at *6* ("The most significant factors affecting where a wireline network will he built relate to cost of construction and the density of the population that will be Served. These factors have a much more significant impact on the network expansion plans than the specific customer profile in a geographic area").

[302] ***ACLU v. FCC***, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (emphasis in original). ***See also*** Consumers for Cable Choice Comments at 8; **DOJ** ***Ex Parte*** at 4.

[303] ***See*** H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), **as *reprinted in*** 1992 U.S.C.C.A.N. 1231, 1259-1260; Mercatus Center Comments at 39-40; ***Phoenix Center Competition Paper*** at 7.

service. Thus, a financial burden was placed upon the monopoly provider in exchange for the undeniable benefit of being able to operate without competition.[304]

88. By contrast, new cable entrants must compete with entrenched cable operators and other video service providers. A competing cable provider that seeks to offer service in a particular community cannot reasonably expect to capture more than a fraction of the total market.‘” Build-out requirements thus impose significant financial risks on competitive applicants, who must incur substantial construction costs to deploy facilities within the franchise area in exchange for the opportunity to capture a relatively small percentage of the market.[306] In many instances, build-out requirements make entry so expensive that the prospective competitive provider withdraws its application and simply declines to serve any portion of the community.[307] Given the entry-deterring effect of build-out conditions, our construction of Section 621(a)(1) best serves the Act’s purposes of promoting competition and broadband deployment.)’*

89. Accordingly, we find that it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates. For example, absent other factors, it would seem unreasonable to require a new competitive entrant to serve everyone in a franchise area before it has begun providing service to anyone. It also would seem unreasonable to require facilities-based entrants, such **as** incumbent LECs, to build out beyond the footprint of their existing facilities before they have even begun providing cable service.[309] It also would seem unreasonable, absent other factors, to require more of a new entrant than an incumbent cable operator by, for instance, requiring the new entrant to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator; or requiring the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve?” We note, however, it would seem reasonable for an LFA in establishing build-out requirements to consider the new entrant’s market penetration. It would also seem reasonable for an LFA to consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success.

90. Some other practices that seem unreasonable include: requiring the new entrant to build out and provide service to buildings or developments to which the new entrant cannot obtain access on reasonable terms; requiring the new entrant to build out to certain areas or customers that the entrant cannot reach using standard technical solutions; and requiring the new entrant to build out and provide service to areas where it cannot obtain reasonable access to and use of the public rights of way. Subjecting a competitive applicant to more stringent build-out requirements than the LFA placed on the incumbent cable operator is unreasonable in light of the greater economic challenges facing competitive applicants explained above. Moreover, build-out requirements may significantly deter entry and thus

[304] **See FTTH** Council Comments at **32-33;** BellSouth Comments at **34.**

[305] ***See, e.g***, AT&T Comments at 50; **FTTH** Council Comments at **29-30**

[306] ***See*** **FTTH** Council Comments at **32-35; DOJ** *Ex Parte* at **12-15** (May IO, **2006); AT&T** Reply Comments at **34-36;** BellSouth Comments at **34-35;** Verizon Comments at **39-40.**

[307] ***See*** **FTTH** Council Comments at **35;** BellSouth Comments at 17-19, **35; USTA** Comments at **22-25;** Verizon Comments at 40-42.

[308] AT&T Comments at **62-64;** BellSouth Comments at **32-33;** Qwest Comments at **21-22; USTA** Comments at **27;** Verizon Comments at **44-46.**

[309] ***See supra*** **paras. 38-40**

[310] **As** we understand these franchising agreements are public documents, we find it reasonable to require the new entrant to produce the incumbent’s current agreement.

forestall competition by placing substantial demands on competitive entrants.

91. In sum, we find, based on the record as a whole, that build-out requirements imposed by LFAs can operate as unreasonable barriers to competitive entry. The Commission has broad authority under Section 621(a)(1) to determine whether particular LFA conditions on entry are unreasonable. Exercising that authority, we find that Section 621(a)(1) prohibits LFAs from refusing to award a competitive franchise because the applicant will not agree to unreasonable build-out requirements.

c. Redlining

92. The Communications Act forbids access to cable service from being denied to any group **of** potential residential cable subscribers because of neighborhood income. The statute is thus clear that no provider of cable services may deploy services with the intent to redline and "that access to cable service [may not be] denied to any group of potential residential cable subscribers because **of** the income of the residents of the local area in which such group resides."[311] Nothing in our action today is intended to limit LFAs' authority to appropriately enforce Section 621(a)(3) and to ensure that their constituents are protected against discrimination. This includes an LFA's authority to deny a franchise that would run afoul of Section 621(a)(3).

93. MMTC suggests that the Commission develop anti-redlining "best practices," specifically defining who is responsible for overseeing redlining issues, what constitutes redlining, and developing substantial relief for those affected by redlining.[312] MMTC suggests that an LFA could afford a new entrant means of obtaining pre-clearance of its build-out plans, establishing a rebuttable presumption that the new entrant will not redline (for example, proposing to replicate a successful anti-redlining program employed in another franchise area).[313] Alternatively, an LFA could allow a new entrant to choose among regulatory options, any of which would be sufficient to allow for build-out to commence while the granular details of anti-redlining reporting are finalized.[314] We note these suggestions but do not require them.

3. Franchise Fees

94. In response to questions in the *Local Franchising NPRM* concerning existing practices that may impede cable entry,[315] various parties discussed unreasonable demands relating to franchise fees. Commenters have also indicated that unreasonable demands concerning fees or other consideration by some LFAs have created an unreasonable barrier to entry.[316] Such matters include not only the universe

[311] 47 U.S.C. § 541.

[312] MMTC Comments at 22, MMTC Reply at 15. MMTC urges that The State Regulators Council of the Advisory Committee on Diversity for Communication in the Digital Age should be the **oversight** committee for redlining issues. MMTC Comments at 24.

[313] MMTC Reply at 11

[314] MMTC Reply at 11 (providing examples of "rapid buildout plan," "equal service verification plan," and "combined plan").

[315] *Local Franchising NPRM*, 20 FCC Rcd at 18588.

[316] *See, e.g.*, AT&T Reply at Attachment C at 5 ("Lynbrook, N.Y. has asked Verizon to provide cameras to film a holiday visit from Santa Claus. Deputy Mayor Thomas Miccio said, 'They know if tbey don't get this process done they're going to be in big, big trouble, so we feel we're in a very good position.'") (citing Dionne Searcey, *As Verizon Enters Cable Business, if Faces Local Static,* WALL ST. J., Oct. 28, 2005, at AI), Verizon Comments at Attachment A at 14 ("Two LFAs in California required application fees of $25,000 and $20,000, respectively.
(continued...)

of franchise-related costs imposed on providers that should or should not he included within the 5 percent statutory franchise fee cap established in Section 622(b),[317] but also the calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated). Accordingly, we will exercise our authority under Section 621(a)(1) to address the unreasonable demands made by some LFAs. In particular, any refusal to award an additional competitive franchise because of an applicant's refusal to accede to demands that are deemed impermissible below shall be considered to be unreasonable. The Commission's jurisdiction over franchise fee policy is well established."' The general law with respect to franchise fees should be relatively well known, but we believe it may be helpful to restate the basic propositions here in effort to avoid misunderstandings that can lead to delay in the franchising process as well as unreasonable refusals to award competitive franchises. To the extent that our determinations are relevant to incumbent cable operators as well, we would expect that discrepancies would be addressed at the next franchise renewal negotiation period, as noted in the FNPRM *infra*, which tentatively concludes that the findings in this ***Order*** should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.[319]

95. We address below four significant issues relating to franchise fee payments. First, we consider the franchise fee revenue base. Second, we examine the limitations on charges incidental to the awarding or enforcing of a franchise. Third, we discuss the proper classification of in-kind payments unrelated to the provision of cable service. Finally, we consider whether contributions in support of PEG services and equipment should be considered within the franchise fee calculation.

96. The fundamental franchise fee limitation is set forth in Section 622(b), which states that "franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."[320] Section 622(g)(1) broadly defmes the term "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."[321] Section 622(g)(2)(c), however, excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[322] And Section 622(g)(2)(D) excludes from the term (and therefore from the 5 percent cap) "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[323] It has been established that certain types of "in-kind" obligations, in addition to monetary payments, may be subject

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Another community in that state has requested an upfront application fee of $30,000 plus an agreement to pay additional expenses (*i.e.*, attorneys fees) of up to an additional $20,000.").

[317] 47 U.S.C. § 542(b)

[318] ***See*** *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) ("[I]t is clear . . . that the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees lies with the federal agency responsible **for** administering the Communications Act.") (emphasis in original).

[319] ***See*** *infra* para. 140.

[320] 47 U.S.C. § 542(b) (emphasis added). FTTH Council supports an alternative cap based on the actual costs of managing the use of public rights-of-way, but we need not address that argument because we do not have the discretion to adopt a different limit than that set by Congress.

[321] 47 U.S.C. § 542(g)(1)

[322] 47 U.S.C. § 542(g)(2)(C).

[323] 47 U.S.C. § 542(g)(2)(D).

to the cap. The legislative history of the 1984 Cable Act, which adopted the franchise fee limit, specifically provides that "lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation."[324]

97. Definition of the 5 percent fee cap revenue base. As a preliminary matter, we address the request of several parties to clarify which revenue-generating services should be included in the gross fee figure from which the 5 percent calculation is drawn.[325] The record indicates that in the franchise application process, disputes that arise as to the propriety of particular fees can be a significant cause of delay in the process and that some franchising authorities are making unreasonable demands in this area.[326] This issue is of particular concern where a prospective new entrant for the provision of cable services is a facilities-based incumbent or competitive provider of telecommunications and/or broadband services. A number of controversies regarding which revenues are properly subject to application of the franchise fee were resolved before the Supreme Court's decision in NCTA *v. Brand X*,[327] which settled issues concerning the proper regulatory classification of cable modem-based Internet access service. Nevertheless, in some quarters, there has been considerable uncertainty over the application of franchise fees to Internet access service revenues and other non-cable revenues. Thus, we believe it may assist the franchise process and prevent unreasonable refusals to award competitive franchises to reiterate certain conclusions that have been reached with respect to the franchise fee base.

98. We clarify that a cable operator is not required to pay franchise fees on revenues from non-cable services.[328] Section 622(b) provides that the "franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide *cable services*."[329] The term "cable service" is explicitly defined in Section 602(6) to mean (i) "the one-way transmission to subscribers of video programming or other programming service," and (ii) "subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[330] The Commission determined in the *Cable Modem Declaratory Ruling* that a franchise authority may not assess franchise fees on non-cable services, such as cable modem service, stating that "revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined."[331] Although this decision related specifically to Internet access service revenues, the same

[324] H.R REP. No. 98-934, at 65 (1984), as *reprinredin* 1984 U.S.C.C.A.N. 4655,4702

[325] Verizon Comments at 63-64; BellSouth Comments at 41-43

[326] *See supra* paras. 43-45.

[327] 125 S. Ct. 2688 *(2005)*. *See infra* note 331.

[328] Advertising revenue and home shopping commissions have been included in an operator's gross revenues for franchise fee calculation purposes. *See* Texas *Coalition of Cities for Utility Issues v. FCC*, 354 F.3d 802, 806 (5th Cir. 2003) ("A cable operator's gross revenue includes revenue from subscriptions and revenue 60m other sources-e.g., advertising and commissions from home shopping networks."); *City of Pasadena, California The City of Nashville, Tennessee and The City of Virginia Beach, Virginia,* 16 FCC Rcd. 18192, 2001 WL 1167612, par. 15 (2001) ("There is no dispute among the parties to this proceeding, or in relevant precedent, that advertising revenue and home shopping commissions can be considered part of an operator's gross revenues for franchise fee calculation purposes.").

[329] 47 U.S.C. § 542(b) (emphasis added).

[330] 47 U.S.C. § 522(6)

[331] *In re Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd 4798, 4851 (2002) *("Cable Modem Declaratory Ruling"), rev'd, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9" Cir.
(continued...)